

IN THE
SUPREME COURT OF THE UNITED STATES
NO. 87-5765 6

KEVIN W. STANFORD,
Petitioner,
v.
COMMONWEALTH OF KENTUCKY,
Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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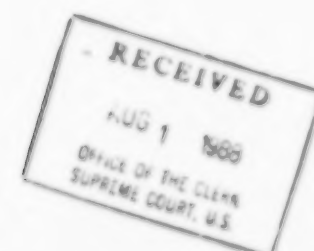


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SUPPLEMENTAL BRIEF FOR PETITIONER

Comes the petitioner, Kevin N. Stanford, pursuant to Rule 22.6 of the rules of this Court, and, in light of the decision announced in Thompson v. Oklahoma, No. 86-6169, ____ U.S. ____, 43 CrL 3197 (Rendered June 29, 1988), hereby files this supplemental brief in support of Question VIII of his petition for a writ of certiorari. In support of this brief, the petitioner presents the following argument.

On November 2, 1987, a petition for a writ of certiorari was filed on behalf of the petitioner. Question VIII of said petition involves the issue of whether imposition of the death penalty on the petitioner, who was 17 years old at the time of the alleged murder, constitutes cruel and unusual punishment in violation of the 8th and 14th Amendments. For the reasons set forth below, the petitioner believes that Thompson v. Oklahoma, *supra* requires his petition for a writ of certiorari be granted and his death sentence be vacated.

ARGUMENT

The murder for which the petitioner was convicted occurred on January 7-8, 1981. He was then 17 years old. At the time of the alleged crime, KRS 208.170(1) which deals with the juvenile court's waiver of jurisdiction and the transfer of an accused juvenile to circuit court for treatment as an adult provided:

If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of the commission of the offense, the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(Emphasis added). That statute was made effective July 15, 1980. See Baldwin's 1980 Kentucky Acts Issue, p. 532. (Appendix, App. 1). The 1980 session of the Kentucky General Assembly also enacted the Kentucky Unified Juvenile Code which was to become effective July 1,

1982. See Baldwin's 1980 Kentucky Acts Issue, pp. xxxvi, 848 and 899. (App. 2). That legislation would have abolished capital punishment for juveniles. See KRS 208F.040(1) which provided:

No youthful offender who has been convicted of a capital offense shall be sentenced to capital punishment, but instead shall be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony.¹

See Baldwin's 1980 Kentucky Acts Issue, p. 899. (App. 2). KRS 208.170 was to be repealed when the new legislation took effect. See KRS 202A.220, Section 152, Baldwin's 1980 Kentucky Acts Issue, pp. 915-916. (App. 3). Thus, at the time of the murder of which the petitioner was convicted, Kentucky had no minimum age for the imposition of capital punishment on juveniles. Indeed, legislation had been proposed abolishing capital punishments for juveniles. However, KRS 208F.040(1) never took effect on July 1, 1982.

The 1982 Session of the Kentucky General Assembly passed legislation that postponed the effective date of the Unified Juvenile Code until July 15, 1984. Baldwin's KRS - 1982 Acts Issue, p. 852. (App. 3). The Kentucky General Assembly, at its 1984 session, repealed the Unified Juvenile Code effective July 13, 1984 (Baldwin's KRS - 1984 Acts Issue, p. 521. (App. 3). Kentucky remained without a minimum age for the imposition of capital punishment on juveniles until September 1, 1987 when KRS 640.040(1) was put into effect. Said statute provided:

No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without the benefit of parole for twenty-five (25) years.

See Baldwin's KRS - 1986 Acts Issue, p. 1098. (App. 4). KRS 208.170 was repealed on September 1, 1987. See Baldwin's KRS - 1986 Acts

1. A Class A felony carried a term of imprisonment of 20 years to life. See KRS 532.060(2)(a). A "youthful offender" was defined as "any person regardless of age, transferred to circuit court under the provisions of this Act." KRS 208A.020(40). Baldwin's 1980 Kentucky Acts Issue, pp. 848, 851. (App. 2).

Issue, pp. 1120-1121. (App. 4). Thus, from January 1, 1975, when KRS 208.170 (App. 4) was first made effective, until September 1, 1987, Kentucky allowed capital punishment to be imposed on juveniles regardless of their age.²

In Thompson v. Oklahoma, supra the plurality concluded "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense." ____ U.S. at ____, 43 CrL at 3203. The concurring opinion concluded that Thompson "and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." (O'Connor, J., concurring). Thompson, ____ U.S. at ____, 43 CrL at 3208. Accordingly, there seem to be two prongs to the Thompson analysis. First, the execution of juveniles who were under the age of 16 at the time of their offenses is constitutionally prohibited. Second, capital punishment statutes enacted by state legislatures must prescribe a minimum age at which the commission of a capital offense can result in the perpetrator's execution. An review of past and present Kentucky laws governing the execution of juveniles supports the conclusion that the petitioner's death sentence must be vacated under the rationale of Thompson.

As noted above, from January 1, 1975 until July 1, 1987, Kentucky law did not set a minimum age for the imposition of capital punishment on juveniles. The enactment of KRS 640.040(1) on July 1,

2. At a pretrial hearing on March 1, 1982, the petitioner's counsel brought to the trial court's attention the fact that the 1980 Session of the Kentucky General Assembly had passed KRS 208F.040(1) which abolished capital punishment for juveniles and was scheduled to take effect on July 1, 1982. Consequently, defense counsel argued that the petitioner should not be subjected to the death penalty at his trial. The trial court reserved judgment on the matter pending submission of briefs by the parties. (Transcript of Hearing 3-1-82, 71-82; App. 5-16). Consequently, the defense filed a brief concerning the application of KRS 208F.040(1) to the case at bar. (TR 81CR1218, Vol. 111, 414-416A; App. 17-20). The prosecution also submitted a brief and that part which is pertinent to the application of KRS 208F.040(1) to the petitioner's trial can be found at App. 21; TR 82CR0406, Vol. 1, 21. The case was continued for trial until August, 1982, in order to determine whether KRS 208F.040(1) would take effect. (TR 82CR0406, Vol. 1, 20; App. 22). On June 24, 1982, defense counsel filed a motion requesting that the case proceed as a Class A Felony and that the petitioner not be subjected to the death penalty because the effective date of KRS 208F.040(1) had been extended to July 1, 1984. (TR 82CR0406, Vol. 11, 139-162; App. 23-24). The motion was denied. (Trial Transcript, Vol. 1, 35; App. 28).

1987 does not support the conclusion that the Kentucky General Assembly intended to limit the imposition of the death penalty to juveniles who had attained a minimum age of 16 at the time they committed their offenses. That notion is undercut by the fact that the Kentucky General Assembly proposed legislation [KRS 208F.040(1)] in 1980 that would have abolished capital punishment for juveniles. Although the effective date of that statute was twice postponed and finally repealed in July, 1984, the fact that the Kentucky legislature took action to abolish the death penalty for juveniles suggests that KRS 208.170 cannot be read as implicitly establishing 16 as a minimum age for the imposition of capital punishment on juveniles. Indeed, in 1984 the Kentucky Supreme Court held that it was not a violation of the 8th and 14th Amendments for a juvenile, who was 15 years old at the time he committed a murder, to be sentenced to death. Ice v. Commonwealth, Ky., 667 S.W.2d 671, 679-680 (1984) reversed on other grounds.

The fact of the matter remains that Kentucky did not set a minimum age for the imposition of capital punishment on juveniles until July 1, 1987, long after the crime for which the petitioner was convicted and sentenced to death. Accordingly, the rationale of Thompson v. Oklahoma, supra, requires that the petitioner's death sentence be vacated.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, respectfully submits that Thompson v. Oklahoma, supra controls the disposition of his case. Accordingly, he respectfully requests the Court to grant his petition for a writ of certiorari, vacate the judgment of the Kentucky Supreme Court and remand the case to said court with instructions to enter an order vacating his death sentence under the authority of Thompson v. Oklahoma.

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Section 164 KRS 208.170 is amended to read as follows:

(1) If, prior to an adjudicatory hearing in the juvenile session of district court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

(3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

(4) If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

(5) When the juvenile session of district court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile session of district court. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile session of district court.

(b) If an indictment is returned, the court may in its discretion order the case transferred to the juvenile session of district court.

(c) If an indictment is returned and the court does not transfer the case to juvenile session of district court, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

Table 1—KRS Numbers and Headings

Section	Heading (Legislative History)	Page
Chapter 208F Youthful Offenders		
208F.040	Sentencing appropriate for Class A felony (in S. 309, § 19, 7-1-82)	899

CHAPTER 280

(S.B. 309)

AN ACT relating to juveniles.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. KRS CHAPTER 208A IS ESTABLISHED AND A NEW SECTION THEREOF CREATED TO READ AS FOLLOWS:

208A.340 This Act shall be known as the Kentucky Unified Juvenile Code.

SECTION 3. A NEW SECTION OF KRS CHAPTER 208A IS CREATED TO READ AS FOLLOWS:

208A.820 As used in this Act unless the context otherwise requires:

(40) "Youthful offender" means any person regardless of age, transferred to circuit court under the provisions of this Act.

SECTION 99. A NEW SECTION OF KRS CHAPTER 208F IS CREATED TO READ AS FOLLOWS:

208F.040 (1) No youthful offender who has been convicted of a capital offense shall be sentenced to capital punishment, but instead shall be sentenced to a term appropriate for one who has committed a Class A felony.

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from Section 88(2), (3), (4), or (5) of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 98 of this Act.

SECTION 150. A NEW SECTION OF KRS CHAPTER 202A IS CREATED TO READ AS FOLLOWS:

Section 152. The following sections of the Kentucky Revised Statutes are repealed:

208.170 Proceedings against children suspected of felony.

BALDWIN'S KRS — 1982 ACTS ISSUE

852

CHAPTER 284

(S.B. 282)

AN ACT relating to the Kentucky Unified Juvenile Code and declaring an emergency.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. Acts, 1980, Chapter 280, Section 153 is amended to read as follows:

This Act shall become effective on July 15, 1984 [1-1982].

Section 2. Whereas, 1980 Senate Bill 309 is scheduled to become effective on July 1, 1982, fifteen (15) days before the normal effective date of other legislation passed at the 1982 Regular Session of the General Assembly and would create a conflict therewith, an emergency is declared to exist and this Act shall become effective immediately upon its passage and approval by the Governor.

Approved April 5, 1982

BALDWIN'S KRS—1984 ACTS ISSUE

521

CHAPTER 184

(S.B. 54)

AN ACT relating to the Kentucky Unified Juvenile Code.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

[Eff. 7-13-84]

Section 1. Acts 1980, Chapter 280 and Acts 1982, Chapter 284 are repealed.

Section 2. It is the intent of the General Assembly that the amendments and repealers of Acts 1980, Chapter 280 not become effective and that statutes affected thereby remain as not amended or not repealed, except as affected by legislation other than Acts 1980, Chapter 280 and Acts 1982, Chapter 284 passed during the 1980, 1982, or this Act.

Approved April 3, 1984

SECTION 137. A NEW SECTION OF KRS CHAPTER 640 IS CREATED TO READ AS FOLLOWS:

640.040 Capital punishment and other prohibited dispositions [Eff. 7-1-87]

(1) No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from subsection (2), (3), (4), (5) or (6) of Section 123 of this Act shall be disposed of by the circuit court in accordance with the provisions of Section 129 of this Act.

BALDWIN'S KRS—1986 ACTS ISSUE

1120 - 1121

Section 198. The following KRS sections are repealed:

208.170 Proceedings against children suspected of felony. [Eff. 7-1-87]

208.170 Proceedings against children suspected of felony

(1) If, during the course of any proceeding in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the best interests of the child and of the public require that the child be tried and disposed of under the regular law governing crimes, the court in its discretion may make an order transferring the case to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.

(2) When the juvenile court so transfers a case to the circuit court:

(a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it may either return an indictment or may return a written report to the circuit court recommending that the child be committed to the department. If the court believes that such commitment would be proper, it may order the child committed to the department.

(b) If, during any stage of the trial in the circuit court, the child or his parent or guardian so requests, the judge in his discretion may stop the trial and commit the child to the department.

(c) If neither of the procedures specified in paragraphs (a) and (b) of this subsection are employed, the child shall be tried as any other defendant.

(d) While under the jurisdiction of the circuit court, the child shall be subject to bail the same as an adult.

(e) Any commitment to the department under paragraph (a) or (b) of this subsection shall be for an indeterminate period not to exceed the age of twenty-one (21).

HISTORY: 1974 11 232 § 306, eff. 1-1-75

1982 c 212 § 4, 1986 c 157, § 26, 1984 c 193 § 4, 1982 c 161 § 17

MR. JASMIN: Okay, your Honor.

MR. JEWELL: Your Honor, we also tendered a motion dealing with the doctrine of the Workman case which has been upheld twice and later by the Kentucky Supreme Court in which they refused to retreat from this holding both in the Anderson versus Commonwealth and in Priary versus Commonwealth. Also we have the new act of this legislature, which we concede does not go into effect until July of this year, but was passed during the 1980 session which would specifically exempt juveniles from the death penalty by statute. We feel that with this word from this legislature, in addition to the supreme Court holding in Workman addressing the issue of youth and saying that a stringent punishment like life without parole was to deal with only the incorrigible, we feel that death would be similar in that feeling in stating that incorrigibility is inconsistent with youth and they would not make that judgment twice having had the opportunity to have a reprieve from it and twice refusing

to do so, is guidance for this Court in dealing with the law of this Commonwealth.

THE COURT: Let me deal specifically with this other aspect to it. What exactly is the statute that's going to be effective July 1, 1982?

MR. JEWELL: Effective July 1, 1982, Kentucky Chapter 208 will be done away with as we know it now dealing with juveniles. Kentucky will have what will be called the Kentucky Unified Juvenile Code which was passed by the 1980 session under Senate Bill 309, the effective date is July 1, 1982. In this code, 208-P.040 Subsection 1 provides that no youthful . . .

THE COURT: Read that a little bit slowly, please.

MR. JEWELL: Okay. KRS 208-P.040 Subsection 1 will provide that no youthful offender who has been convicted for a capital offense should be sentenced to capital punishment. The new code provides that youthful offenders or any person, regardless of age transferred to the Circuit Court from the Juvenile Court under the

provisions of the new unified code. I would cite 208-A.020 Subsection 4 and Juvenile Court would have jurisdiction, like they do now, of any person who commits a crime who is under 18. 208-A.0301. Therefore, any person who commits, for example, capital murder, when they're under the age of 18 . . .

THE COURT: Can I see that statute?

MR. JEWELL: I'm going to have to send a copy of it to you, Judge. I don't have a copy of it with me.

THE COURT: I know you referred to it in your brief, but I need to see it. Well, you can back after lunch, I'm going to have to break for lunch and a motion hour anyhow at about noon.

MR. JEWELL: Okay, your Honor, if we could bring the statute itself over at that time. It is printed in the new statute after the 1980 session with the warning on it that it's not effective until July 1, 1982.

THE COURT: All right, what would be the effect that this case was

tried after July 1, 1982?

MR. JEWELL: If this case was tried after July 1, 1982, your Honor, I would think . . .

THE COURT: Is there a procedural statute that would be effective to this case?

MR. JEWELL: I believe there would be, your Honor, I think it would be procedural as to how we proceed up here, and how effective the trial would be, and I believe that it would be effective for this trial if this trial was set, say, July 2nd.

MR. JASMIN: Was counsel concluded?

MR. JEWELL: I have concluded with that.

MR. JASMIN: The Commonwealth's position with reference to retroactive application of the statute based upon 445.083 and it specifically says no statute shall be construed to be retroactive unless it's expressly so declared. Now, in 218-F, is that expressly declared that it would be applied retroactively?

THE COURT: The problem is what's the definition of what's retro-active and what's not. Procedural statutes usually apply, not based on the time of the occurrence, but on the time of the procedure. If this is a procedural statute, then it seems to me that it would apply to any case tried after July 1, 1982.

MR. JASMIN: Well, the Commonwealth's position is, that we don't have to worry about whether it's procedural or not if it's a statute, because another statute specifically says that a statute cannot be construed retroactively and it doesn't specify . . .

THE COURT: Shall we dance around that pole again? The question is not whether statute should apply retroactively, the question is whether or not this is a procedural statute. A procedural statute does not apply retroactively, but it applies to the procedure ahead of it.

MR. JASMIN: I would agree with that, Judge. All I'm saying, is 446.580, regardless of the date says regardless

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to the debate of procedure or substance says that unless the statute specifically indicates it is to be applied retroactively, it shall not be applied retroactively under Subsection 3.

THE COURT: Well, that doesn't answer my question, the question in my mind, Mr. Jasmin.

MR. JASMIN: Well, Judge, all the Commonwealth is saying is that there is nothing in the statute which talks in terms on how statutes are applied and they are talking about 218-F.

THE COURT: Do you agree that offenses committed by juveniles after July 1 of 1982, the death penalty would have no application?

MR. JASMIN: No, I would not agree to that as of this point, Judge, because there is some questions as to whether or not the situation is going to pass or going to go into effect.

MR. HECTUS: It's already passed.

MR. JASMIN: I know

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that it's already passed. But, the person sponsoring is now in state legislature moving to knock it out.

THE COURT: It's already a law, you're saying it could be repealed.

MR. JASMIN: No. What I'm saying is, is that it is not a law which can be applied until June. What I'm suggesting to this Court is that it's not in effect now and its sponsor, Maloney from Lexington, is moving currently that it be repealed.

MR. HECTUS: Your Honor, in my brief I did not cite the statute and I would like to adopt that part of Mr. Jewell's motion as to the statutory construction problem and furthermore.

THE COURT: I'm going to reserve judgment on that and take that under consideration. It seems to me this case ought not to turn on whether the case is tried before or after July 1, 1982. I'm more concerned about whether the statute, if it were being tried after July 1, 1982, would apply to this case or not.

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MR. JEWELL: Could we address that after lunch?

MR. HECTUS: Judge, I would like to submit a brief on that, I'm not prepared to argue it today.

MR. JASMIN: Judge, the Commonwealth is also going to request an opportunity to do some extensive researching.

THE COURT: I think that that's a very serious point and it needs to be taken care of, probably separately addressed on a different day than today.

MR. JEWELL: I'll go along with that.

THE COURT: I don't, frankly, I don't anticipate that, you know, that if the . . . if there is a reasonable probability that this statute could have application if the case was tried after July 1, 1982, that you fellows would want to move for a continuance.

MR. JEWELL: I'll be moving for a continuance today.

MR. JASMIN: Your Honor, so that we understand . . . so that I under-

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stand what the Court is referring to, you are overruling the motion with reference to the death penalty until, but you want to look at 208-F, is that correct, and the anticipated statute which will come effective on July 1st?

THE COURT: I think that, Mr. Jasmin, is substantially correct. I'm not going to rule that the death penalty in an aggravated circumstance, if it's proved, is cruel punishment; nor am I going to rule it's cruel punishment because it's applied to a 16 or 17-year-old as opposed to an 18-year-old.

MR. HECTUS: So you're distinguishing Workman and we'll read the statute, then?

THE COURT: Because I am concerned about whether . . . I'm going to reserve judgment on that one issue, and that's the one that bothered me the most when I was reading this material last night. It doesn't seem to me that the death penalty ought to turn on anything as gratuitous as whether this case is tried in March or July.

if such is the case.

MR. JASMIN: To clear the record then, you're saying the memorandum supplied by counsel for Buchanan, and where he says motion memorandum to exclude death penalty due to insufficient statutory guidance, that's been overruled, is that correct?

THE COURT: I'm overruling all of these motions relating to foreclosing the death penalty except the motion which is directed to the arbitrary and capricious nature of its application in this case because of or the possible arbitration as it applies in this case, because of the statute 208-F.02 Subsection 1. I'm going to reserve judgment on that and I think you'd better response to that.

MR. JASMIN: I will, Judge.

MR. HECTUS: Judge, do you want to give us a date by which we will submit our memorandums?

THE COURT: You've made your motion. It's just a question of his responding. All I really need from you all . . .

well, I would like both sides to respond by next Monday to give me whatever they're going to give me on whether this, you know, whether this should be considered . . . I don't want this to get hung up in legalism about retroactive or prospective application because if the statute is procedural, it means it applies at the time of this procedure, that the procedure is enacted. If the statute is substantive, and this relates to rights which exist, then those are fixed by what happens at the time of the offense. I would think that a penalty provision is substantive, but I would like to hear about that.

MR. JEWELL: Okay, we will . . .

THE COURT: I think there is some law that a penalty provision is substantive.

MR. HECTUS: Your Honor, 4.6 also addresses the penalty section that Mr. Jasmin didn't cite, and I think it has something to do with sentencing at the time of that new statute, whether or not it allows the defendant or the Court to set sentence

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CLERK OF JEFFERSON CIRCUIT COURT
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BY D.C.

under a new statute as opposed to the old statute. It's not in the criminal law . . .

MR. JEWELL: What was that?

MR. HECTUS: 440.080.

MR. JASMIN: 440.080

does not cover it.

THE COURT: Well, he says there's more in that statute. Well, anyhow, we're clear about that. I'm going to definitely consider that, and I want you all to submit it at the motion hour next Monday. I want you all to have anything that you want to submit by next Monday at the motion hour. I will try to hear you after the motion hour.

MR. JEWELL: Okay, thank you, your Honor.

THE COURT: All right. That takes care of all of those motions related to excluding the death penalty. Now, what about the motion to transfer back to Juvenile Court?

MR. JEWELL: I have a motion, Judge, to that on behalf of Kevin

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NO. 81CR1218

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

NOTICE - BRIEF

KEVIN N. STANFORD

DEFENDANT

* * *

NOTICE

TO: Hon. Ernest Jasmin
Assistant Commonwealth's Attorney
600 Legal Arts Bldg.
Louisville, Kentucky 40202

The following will be presented at motion hour in Division 9,
March 8, 1982 at 12:30 p.m. per previous order of the court.

BRIEF PERTAINING TO APPLICATION OF
DEATH PENALTY FOR JUVENILE CRIMES
AFTER JULY 1ST

ISSUE ADDRESSED

Whether KRS 208F.040, effective July 1, 1982, would apply to
this case should it be tried after July 1982?

ARGUMENT

That application of KRS 208F.040, after its effective date to
the present case would not violate the protection from ex post facto
laws as it is procedural in nature, and, in fact, the defendant, under
Kentucky statutory law, can consent to the use of new law which miti-
gates punishment.

The 1980 session of the Kentucky General Assembly passed into
law the Kentucky Unified Juvenile Code but did not make this Code ef-
fective until July 1, 1982. Under this Code KRS 208F.040(1) provides

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that no youthful offender convicted of a capital offense shall be
sentenced to capital punishment but shall be sentenced for a Class A
felony. A youthful offender, in the new Code, is defined as "any
person regardless of age, transferred to circuit court under the pro-
visions of KRS Chapters 208A to 208G. KRS 208A.020(40).

If the defendant was to be tried after July, 1982, the pro-
vision excluding the death penalty would be applicable to him. The
protection against ex post facto laws is designed to be a limit on
matters of remedies and procedures. See Dobbert v. Florida, 432 U.S.
282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) citing Beazell v. Ohio, 269
U.S. 167 46 S.Ct. 68, 70 L.Ed 216; and Malloy v. South Carolina 237
U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905. A procedural change is not ex
post facto. The new law in the instant case is a juvenile code gov-
erning procedure and jurisdiction. There is no amendment to the law
the defendant is charged with violating. The elements will remain the
same for all substantive offenses and the only change will be in how
the defendant is proceeded against.

In Dobbert v. Florida, supra, the petitioner committed a capital
offense while the statute providing for the death penalty in effect at
the time was constitutionally infirm. After that law was struck down,
but before the trial of the petitioner, a new death penalty law was en-
acted. The Supreme Court held that the petitioner was subject to the
new law even though it was passed after the time of his alleged crimes.
The Court held that the enactment of a new death penalty procedure was
merely a procedural change and not an ex post facto law. In the case
of Kevin Stanford, KRS 208F.040 was actually passed by the legislature
prior to his alleged crime and only to effective date post-poned. If

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Stanford's trial was held after the effective date, KRS 208F.040 would certainly apply at trial under the authority of Dobbert v. Florida.

It was also held in Dobbert v. Florida, supra, that in order to be ex post facto, it was axiomatic that a new law had to be more onerous than the sentence of death. KRS 446.110 states "...If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect." This sentence out of KRS 446.110 is exactly the same language contained in the prior Kentucky Statutes section 465. It was held under that statute that the defendant could obtain the benefit of a lesser punishment under a law enacted after the date of his offense if the new law definitely mitigated the allowable punishment and the defendant consented to judgment being pronounced under the new law. Coleman v. Commonwealth, 160 Ky. 87, 169 S.W. 595 (1914) and Earl v. Commonwealth, 202 Ky. 726, 261 S.W. 239 (1924). In the present case the new procedures of KRS 208F.040 definitely mitigates Stanford's punishment by reducing maximum punishment from death to life in prison. The consent of the defendant to the Court applying KRS 208F.040 is evident and obvious from the pleadings.

For the reasons stated above, it is clear that if this trial were to be held after the effective date of KRS 208F.040, the new law would apply both as a procedural change and as consented to by the defendant under KRS 446.110.

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CERTIFICATE

This is to certify that a copy of the foregoing motion was delivered to the Hon. Ernest Jasmin, Assistant Commonwealth's Attorney, or his agent, on this the ____ day of March, 1982.

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JAMES M. SHAKE
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NO. 81CR1218

FILED IN COURT

JEFFERSON CIRCUIT COURT

MAR 15 1982

NINTH DIVISION

COMMONWEALTH OF KENTUCKY

PAULIE MILLER, Clerk

PLAINTIFF

VS.

RESPONSE TO BRIEF PERTAINING TO
APPLICATION OF DEATH PENALTY FOR JUVENILE CRIMES

KEVIN STANFORD
DAVID BUCHANAN

DEFENDANTS

ARGUMENT

1. That the application of K.R.S. 208F.040, after the effective date, to the present case under the current case law could be applied if said case is tried after its effective date. However, it would appear that 208F will not go into effect on July 1, 1982, in that Senate Bill 282, which repeals the juvenile court (208F) was passed by the Senate on February 26 and is currently in the House Judiciary Criminal Committee.
2. The application of Workman v. Commonwealth, 429 S.W. 2d 374, has precedence in the current case. In Workman the issues involved conviction of a fourteen year old defendant of forcible rape which was the only charge under Kentucky Revised Statutes which permitted the punishment of life without parole. In the current application of juvenile law, fourteen year olds cannot even be waived to the grand jury for treatment as adults and the provision in our criminal code which allowed conviction and a sentence of life without parole on a rape charge has been abolished. Based upon that case, the defendants argue that the imposition of the death penalty on a juvenile is cruel and unusual punishment.

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NO. 81CR1218

JEFFERSON CIRCUIT COURT

NINTH DIVISION

COMMONWEALTH OF KENTUCKY

PLAINTIFF

-VS-

ORDER

Stanford & Buchanan

DEFENDANT

Comes the Defendant and the Commonwealth and moves the Court to continue this case and as grounds therefore, states as follows: By agreement case is reassigned to the date set out below, due to a decision pending in the legislative regarding the death penalty of juveniles.

Defence is not ready due to an exam. of the defendants.

Defendants to report back in one week regarding the progress of the exam.

ENTERED IN COURT.

MAR 15 1982

PAULIE MILLER, Clerk
By Franklin P. Jewell Deputy Clerk

Commonwealth Attorney

Thomas Hecht
Defense Attorney

The Court being sufficiently advised, this case is continued to the 02 day of July, 1982, for trial.

Charles W. Leibson
CHARLES W. LEIBSON, JUDGE

DATED: _____

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NO. 82CR0406

COMMONWEALTH OF KENTUCKY

VS.

KEVIN N. STANFORD

FILED JUNE 24 11 42 AM '82 JEFFERSON CIRCUIT COURT

DIVISION NINE

PLAINTIFF

DEFENDANT

NOTICE-MOTION-ORDER

NOTICE

TO: HON. ERNEST JASMIN
ASSISTANT COMMONWEALTH ATTORNEY
600 LEGAL ARTS BLDG.
LOUISVILLE, KY. 40202

Please take notice that the following motion will be made on the 28th day of June, 1982 in Division Nine, at the regularly scheduled motion hour at 12:30 P.M.

MOTION TO PROCEED AS CLASS A FELONY

Comes the defendant, by counsel, and moves this Court to enter an order that the above-styled indictment shall be tried as a Class A Felony as opposed to a capital offense. In support of this motion, the defendant notes the following:

1. Defendant, by counsel, has previously filed with this Court on or about February 25, 1982 a motion to exclude death as a possible penalty along with a memorandum in support of defendant's motion to exclude the death penalty, and on or about March 5, 1982 the brief pertaining to application of death penalty for juvenile crimes after July 1, 1982.

2. In ruling on these motions, the Court ruled that

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because of the passage of KRS 208F.040 with an effective date of July 1, 1982, the above-styled action could not be tried as a capital case if, in fact, KRS 208F.040 went into effect July 1, 1982.

3. The Court expressed reservations about ruling on the defendant's motion to exclude the death penalty based on the defendant's argument under Kentucky case law, specifically the case of Workman v. Commonwealth, Ky. 429 S.W.2d 374 (1968) and subsequent cases because the Court felt it would be presumptuous for it to rule on a constitutional issue at the time the motion was made.

4. KRS 208F.040, as well as the entire Kentucky Unified Juvenile Code, was given a new effective date by this session of the Kentucky General Assembly. The new effective date of the Kentucky Unified Juvenile Code including KRS208F.040, which would not allow the death penalty for any person who commits a crime under the age of 18, is July 1, 1984.

5. This new effective date was given because of financial difficulty with the implementation of the entire code.

6. Under the most recent case of Smith v. Commonwealth, KY., ___ S.W.2d ___ (29 KLS 7, p. 14, 1982), the Court has the power in any capital case to relieve the jury of any consideration of the death penalty. In that case, the Court would not allow the case to go into a penalty phase, even though the Commonwealth was seeking the death penalty, because the Court reasoned that it would be unconstitutional to give a "nontrigger man" the death penalty since the "trigger man" had received the minimum sentence of twenty years.

7. Since it now appears certain that a trial court may refuse to allow a case to be tried as a capital case, even

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though the Commonwealth claims aggravating circumstances, if the Court finds that the penalty would be disproportionate or that the penalty would be infirm in some other way, the defendant respectfully asks this Court to reconsider the merits of the defendant's arguments based upon the case law under Workman v. Commonwealth, supra, and subsequent cases and based upon the fact that the Kentucky General Assembly is consistent in making its desires known that KRS 208F.040, which would exclude the death penalty to those committing crimes under the age of 18, shall become law of this Commonwealth within two years from the date that the above-styled action is set for trial. The defendant's position has been clearly stated in detail and its prior motion to exclude death penalty as possible punishment, its prior memorandum in support of defendant's motion to exclude the death penalty, and its prior brief pertaining to application of death penalty for juvenile crimes up to July 1, 1982.

WHEREFORE, relying on arguments previously stated to this Court, the defendant moves this Court under its discretionary power to relieve the jury of any consideration of the death penalty to proceed with this case as a Class A felony for which punishment for the charge of Murder would be 20 years to life.

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CERTIFICATE

This is to certify that a copy of the foregoing motion was delivered to the Hon. Ernest Jasmin, Assistant Commonwealth Attorney, or his agent, on this the 24th day of June, 1982.

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NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY

PLAINTIFF

VS.

O R D E R

KEVIN N. STANFORD

DEFENDANT

* * * *

Motion having been made and the Court being
sufficiently advised,

IT IS HEREBY ORDERED that the above-styled Indictment
shall not be tried as a capital offense, but that the penalty
for the charge of Murder shall be that of a Class A felony from
20 years to life.

HON. CHARLES LEIBSON, JUDGE
JEFFERSON CIRCUIT COURT

DATE ENTERED

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MR. JEWELL: We also have one
motion which the Court have under submission to exclude the
death penalty based on the defendant's age which has not
been finally ruled on.

THE COURT: I thought I had
ruled on that.

MR. JEWELL: You remember
you want to wait to see if the law is repealed.

THE COURT: You're right, I
told you how I was going to rule on it.

MR. JEWELL: And, now the law
was merely delayed, so I filed a follow-up motion to
that back in June and the Court took it under submission.

THE COURT: My position is
that when the legislature moved that to 1984, that will
be delayed then, too, in my opinion. So, you're overruled
on that, too, the case will be tried as a capital case.

MR. HECTUS: I had, at one
time, filed a motion for separate juries for the guilt or
innocent portion of the trial and the penalty phase of
the trial. Of course, the basis of my motion was that
a death qualified jury is prosecution prone according to
studies that I appended to my motion and I would like
to renew my motion because I now have a client that's
not even subject to the death penalty but is going to be
tried by a death qualified jury.

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